

JAKE LOUIS TAFURI,  
Plaintiff,  
v.  
CAROLYN W. COLVIN, Commissioner  
of Social Security,<sup>1</sup>  
Defendant.

**JURISDICTION**

On December 4, 2008, Plaintiff protectively filed an

<sup>1</sup>Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to FED. R. CIV. P. 25(d), Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant in this suit. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 application for supplemental security income insurance benefits,  
2 alleging disability beginning July 20, 2000. Tr. 27; 139. In his  
3 application for benefits, Plaintiff reported that he stopped working  
4 due to "mental health mental health dysthymia [sic], social phobia  
5 with anxiety feature, schizotypal personality disorder with dominant  
6 paranoid features. Mental disability." Tr. 143. Plaintiff's claim  
7 was denied initially and on reconsideration, and he requested a  
8 hearing before an administrative law judge (ALJ). Tr. 81-90. A  
9 hearing was held on December 8, 2009, which medical expert Steven  
10 Rubin, Ph.D., vocation expert Polly Peterson, and Plaintiff, who was  
11 represented by counsel, testified. Tr. 41-77. ALJ Paul T. Hebda  
12 presided. Tr. 41. The ALJ denied benefits on December 31, 2009.  
13 Tr. 27-37. Plaintiff sought review with the Appeals Council, and  
14 was denied. Tr. 1-3. The instant matter is before this court  
15 pursuant to 42 U.S.C. § 405(g).

#### 16 STATEMENT OF THE CASE

17 The facts of the case are set forth in detail in the transcript  
18 of proceedings and are briefly summarized here. At the time of the  
19 hearing, Plaintiff was 26 years old, living in an apartment in Deer  
20 Park, with his girlfriend. Tr. 59-60. Plaintiff socializes only  
21 with his girlfriend and his parents. Tr. 62.

22 Plaintiff graduated from high school in 2001, and for a short  
23 time he attended the Seattle Arts Institute, but he testified that  
24 he had to drop out when he had a "very large seizure while I was  
25 there due to the extreme stress from living in such a populated  
26 area." Tr. 60-62; 265. Plaintiff also briefly attended Spokane  
27 Falls Community College and studied graphic design. Tr. 61.  
28 Plaintiff briefly worked at a seasonal tree farm, and he testified

1 that whenever he had to interact with his boss or other employees,  
2 he experienced stress. Tr. 63. Plaintiff also worked briefly in a  
3 night-time stocking job for a grocery store, and he testified that  
4 the other stockers "did not take kindly to me and were constantly  
5 talking about me in the next aisle." Tr. 64. He also said he was  
6 unable to remember the produce codes, so he was fired. Tr. 64.

7 Plaintiff testified that "all day, everyday," he sits at the  
8 computer and creates art. Tr. 66. He does basic household chores,  
9 "straightening up and dishes." Tr. 67. He testified that his sleep  
10 is "extremely erratic," and on occasion, he stays up for days in a  
11 row, and then sleeps for 16 hours. Tr. 67. Plaintiff testified  
12 that he recently began counseling at Spokane Family Services because  
13 he knows he needs to "try to take steps forward." Tr. 67-68.

#### 14 ADMINISTRATIVE DECISION

15 At step one, ALJ Hebda found Plaintiff had not engaged in  
16 substantial gainful activity since December 4, 2008, the application  
17 date. Tr. 29. At step two, he found Plaintiff had the following  
18 severe impairments: schizotypal personality disorder with social  
19 phobia and dysthymia. Tr. 29. At step three, the ALJ determined  
20 Plaintiff's impairments, alone and in combination, did not meet or  
21 medically equal one of the listed impairments in 20 C.F.R., Subpart  
22 P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925 and 416.926). Tr.  
23 30. The ALJ found Plaintiff has the Residual Functional Capacity  
24 ("RFC") to perform

25 [M]edium work . . . except low stress work, *i.e.*, only  
26 occasional decisions are required and there are only  
27 occasional changes in the work setting. The work should  
28 also involve superficial interaction with public and only  
occasional interaction with coworkers but with no tandem  
tasks required. He can have occasional contact with  
supervisors.

1 Tr. 31.

2 In his step four findings, the ALJ found Plaintiff's statements  
3 regarding pain and limitations were not credible to the extent they  
4 were inconsistent with the RFC findings. Tr. 32. The ALJ found  
5 that Plaintiff had no past relevant work, and after considering  
6 Plaintiff's age, education, work experience, and residual functional  
7 capacity, jobs exist in significant numbers in the national economy  
8 that the Plaintiff can perform, such as chicken farm laborer, store  
9 laborer, or canvas shop laborer. Tr. 36-37.

#### 10 STANDARD OF REVIEW

11 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
12 court set out the standard of review:

13 A district court's order upholding the Commissioner's  
14 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
15 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
16 Commissioner may be reversed only if it is not supported  
17 by substantial evidence or if it is based on legal error.  
18 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
19 Substantial evidence is defined as being more than a mere  
20 scintilla, but less than a preponderance. *Id.* at 1098.  
21 Put another way, substantial evidence is such relevant  
22 evidence as a reasonable mind might accept as adequate to  
23 support a conclusion. *Richardson v. Perales*, 402 U.S.  
24 389, 401 (1971). If the evidence is susceptible to more  
25 than one rational interpretation, the court may not  
26 substitute its judgment for that of the Commissioner.  
27 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
28 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

29 The ALJ is responsible for determining credibility,  
30 resolving conflicts in medical testimony, and resolving  
31 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
32 Cir. 1995). The ALJ's determinations of law are reviewed  
33 *de novo*, although deference is owed to a reasonable  
34 construction of the applicable statutes. *McNatt v. Apfel*,  
35 201 F.3d 1084, 1087 (9th Cir. 2000).

36 It is the role of the trier of fact, not this court, to resolve  
37 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
38 supports more than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner. *Tackett*, 180  
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
3 Nevertheless, a decision supported by substantial evidence will  
4 still be set aside if the proper legal standards were not applied in  
5 weighing the evidence and making the decision. *Browner v. Secretary*  
6 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
7 substantial evidence exists to support the administrative findings,  
8 or if conflicting evidence exists that will support a finding of  
9 either disability or non-disability, the Commissioner's  
10 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
11 1230 (9<sup>th</sup> Cir. 1987).

#### 12 SEQUENTIAL PROCESS

13 The Commissioner has established a five-step sequential  
14 evaluation process for determining whether a person is disabled. 20  
15 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
16 137, 140-42 (1987). In steps one through four, the burden of proof  
17 rests upon the claimant to establish a prima facie case of  
18 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.  
19 This burden is met once a claimant establishes that a physical or  
20 mental impairment prevents him from engaging in his previous  
21 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a  
22 claimant cannot do his past relevant work, the ALJ proceeds to step  
23 five, and the burden shifts to the Commissioner to show that (1) the  
24 claimant can make an adjustment to other work; and (2) specific jobs  
25 exist in the national economy which claimant can perform. *Batson v.*  
26 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).  
27 If a claimant cannot make an adjustment to other work in the  
28 national economy, a finding of "disabled" is made. 20 C.F.R. §§

1 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

2 **ISSUES**

3 Plaintiff contends that the ALJ erred in improperly rejecting  
4 the opinions of Plaintiff's medical providers, in crafting a  
5 deficient residual functional capacity and by posing an incomplete  
6 hypothetical to the vocational expert. ECF No. 14 at 12-14.

7 **A. Medical Opinions**

8 Plaintiff argues that the ALJ failed to give proper reasons for  
9 rejecting the DSHS assessments of W. Scott Mabee, Ph.D., and the  
10 opinions from testifying expert Stephen Rubin, Ph.D., and by relying  
11 upon only a portion of the assessment by Mary Gentile, Ph.D. ECF  
12 No. 14 at 11.

13 **1. W. Scott Mabee, Ph.D.**

14 The ALJ explained that he gave little weight to the DSHS  
15 opinions - the Psychological/Psychiatric Evaluations completed by  
16 Ms. Carroll, Mr. Erickson and approved by Dr. Mabee - because they  
17 were not supported by objective evidence. Tr. 34-35. The ALJ noted  
18 that the Plaintiff had average functioning in cognitive functioning,  
19 memory and IQ, and he had full impulse control and has no limits in  
20 exercising judgment. The ALJ acknowledged Plaintiff likely has  
21 limitations in social functioning, but because evidence of over-  
22 reporting of symptoms, the ALJ concluded that the RFC adequately  
23 provided Plaintiff's schizotypal personality disorder. Tr. 35-36.

24 Three types of medical sources are recognized in social  
25 security cases: (1) treating physicians; (2) examining physicians;  
26 and (3) those who neither examine nor treat the claimant, called  
27 reviewing or nonexamining physicians. *Lester v. Chater*, 81 F.3d  
28 821, 830 (9<sup>th</sup> Cir. 1995). Generally, a treating physician's opinion

1 should be accorded more weight than opinions of doctors who did not  
2 treat the claimant, and an examining physician's opinion is entitled  
3 to greater weight than a non-examining physician's opinion. *Id.*  
4 Where a treating or examining physician's opinion is uncontradicted  
5 by another doctor, the Commissioner must provide "clear and  
6 convincing" reasons for rejecting the treating physician's ultimate  
7 conclusions. *Id.*

8 Because the Social Security Administration ("SSA") favors the  
9 opinion of a treating physician over non-treating physicians, if the  
10 treating or examining doctor's medical opinion is contradicted by  
11 another doctor, the Commissioner must provide "specific and  
12 legitimate" reasons for rejecting that medical opinion, and those  
13 reasons must be supported by substantial evidence in the record.  
14 *Id.* at 830-31. "'The ALJ can meet this burden by setting out a  
15 detailed and thorough summary of the facts and conflicting clinical  
16 evidence, stating his interpretation thereof, and making findings.'" *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9<sup>th</sup> Cir. 2008) (quoting  
17 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.1989)). However,  
18 "[t]he ALJ must do more than offer his conclusions. He must set  
19 forth his own interpretations and explain why they, rather than the  
20 doctors', are correct." *Orn v. Astrue*, 495 F.3d 625 (9th Cir.  
21 2007). Moreover, "a finding that a treating source medical opinion  
22 . . . is inconsistent with the other substantial evidence in the  
23 case record means only that the opinion is not entitled to  
24 'controlling weight,' not that the opinion should be rejected." *Id.*  
25 at 631-32 (quoting Social Security Ruling ("SSR") 96-2p). "In many  
26 cases, a treating source's medical opinion will be entitled to the  
27 greatest weight and should be adopted, even if it does not meet the  
28

1 test for controlling weight." SSR 96-2p.

2 In this case, Dr. Mabee approved and adopted two examinations  
3 of Plaintiff: a 2007 examination by Victoria Carroll, MS Cand., and  
4 a 2008 examination by Steven Erickson, M.Ed., LMHC. Dr. Mabee  
5 examined Plaintiff in 2009. Tr. 258-80; 329-54. After Ms.  
6 Carroll's 2007 examination of Plaintiff, Dr. Mabee approved an  
7 assessment of Plaintiff that included multiple severe social  
8 limitations, and multiple mild cognitive limitations. Tr. 273. Ms.  
9 Carroll indicated Plaintiff had four severe limitations in social  
10 functioning, including the abilities to: (1) relate appropriately to  
11 co-workers and supervisors; (2) interact appropriately in public  
12 contacts; (3) respond appropriately to and tolerate the pressures  
13 and expectations of a normal work setting; and (4) control physical  
14 or motor movements and maintain appropriate behavior. Tr. 273. Ms.  
15 Carroll administered multiple tests and noted that the MMPI-2 was  
16 invalid, a result she opined was "likely the result of his current  
17 psychological distress and not an intentional distortion of his  
18 symptoms." Tr. 278.

19 Ms. Carroll diagnosed Plaintiff with social phobia - with  
20 general anxiety features, dysthymia, and schizotypal personality  
21 disorder with borderline features. Tr. 278-79. At that time, Ms.  
22 Carroll opined, "[i]t is highly unlikely that Mr. Tafuri would be  
23 able to obtain or maintain employment currently." Tr. 279. She  
24 also stated that while Plaintiff should be able to understand and  
25 follow simple and complex verbal instructions, and to focus and  
26 sustain concentration and memory, his ability to reason and use  
27 appropriate judgment is impacted by his mental illness. Tr. 279-  
28 80. Ms. Carroll concluded that Plaintiff would be unable to



1 function in a typical work environment.

2 The following year, Mr. Erickson's September 6, 2008,  
3 evaluation included moderate limitations in the ability to exercise  
4 judgment and make decisions and in the ability to perform routine  
5 tasks. Tr. 260. Mr. Erickson also assessed Plaintiff with a severe  
6 limitation in the ability to interact appropriately in public  
7 contacts, and with marked limitations in the ability to (1) relate  
8 appropriately to co-workers and supervisors; (2) respond  
9 appropriately to and tolerate the pressures and expectations of a  
10 normal work setting; and (3) control physical or motor movements and  
11 maintain appropriate behavior. Tr. 260. Mr. Erickson noted that  
12 Plaintiff's profile was questionably valid, in that with respect to  
13 negative impression management, some indications existed that  
14 Plaintiff "may have over-endorsed items that may create an  
15 unfavorable impression. His results do raise the possibility that  
16 he may have exaggerated some of his psychological complaints and  
17 symptoms." Tr. 267. In the narrative, Mr. Erickson observed that  
18 Plaintiff's test results indicated he may become quite anxious and  
19 threatened by interaction with unknown individuals, and that his  
20 social judgment is likely poor in terms of making difficult  
21 decisions. Tr. 267. Moreover, Mr. Erickson opined that it is likely  
22 Plaintiff is "plagued by worry to a degree that it would have a  
23 negative impact on his ability to concentrate and attend." Tr. 267.  
24 Mr. Erickson described how Plaintiff's social limitations would  
25 likely affect his ability to work:

26 [Plaintiff's] response pattern suggests he is very  
27 suspicious and possibly hostile in his relationships with  
28 others. He may also be extremely sensitive in his  
interactions with others and likely harbors strong  
feelings of resentment. This would make working

1 relationships with others likely very strained, despite  
2 efforts by those around him to demonstrate support and  
assistance.

3 . . . .

4 . . . . This consistent fear of being exposed to social  
5 situations will created marked limitations in terms of his  
6 willingness to participate socially or in an employment  
situation.

7 Tr. 268.

8 Mr. Erickson also cautioned that when Plaintiff is not anxious,  
9 he has the cognitive ability to focus and retain information, but  
10 "when physically responding to anxiety, [Plaintiff's] cognitive  
11 abilities will be limited." Tr. 268-69. Mr. Erickson concluded  
12 that due to his personality features and social anxiety, it is  
13 unlikely he would be able to either obtain or maintain employment.  
14 Tr. 269. Mr. Erickson concluded, "Cognitively, [Plaintiff] should  
15 do well in an isolated setting. However, when required to function  
16 around groups of unknown individuals, he would experience cognitive  
17 limitations." Tr. 269.

18 Finally, the third DSHS examination of Plaintiff was conducted  
19 by Dr. Mabee, on October 8 and 13, 2009. Tr. 334. Dr. Mabee  
20 administered several tests to Plaintiff and observed Plaintiff's odd  
21 presentation and behavior, and he opined these limitations would  
22 markedly affect Plaintiff's work activities. Tr. 330. Dr. Mabee  
23 assessed Plaintiff with moderate limitations related to discomfort  
24 around people and/or fear of judgment; self-consciousness and/or  
25 difficulty meeting others; low motivation and/or sleep patterns; and  
26 odd thinking and speech. Tr. 330.

27 Dr. Mabee diagnosed Plaintiff with social phobia, generalized  
28 dysthymic disorder and schizotypal personality disorder with

1 borderline features. Tr. 331. He assessed Plaintiff with four  
2 marked limitations in the social ability to: (1) relate  
3 appropriately to co-workers and supervisors; (2) interact  
4 appropriately in public contacts; (3) respond appropriately to and  
5 tolerate the pressures and expectations of a normal work setting;  
6 and (4) maintain appropriate behaviors in a work setting. Tr. 332.  
7 Dr. Mabee found Plaintiff was moderately limited in his ability to  
8 exercise judgment and make decisions and in his ability to care for  
9 himself, including personal hygiene and appearance. Tr. 332. Dr.  
10 Mabee opined that Plaintiff is cognitively capable of understanding  
11 and carrying out simple and relatively complex tasks, but he can  
12 sustain concentration for only a short period of time. Tr. 332.  
13 Dr. Mabee stated that Plaintiff would work best in positions that  
14 have limited contact with co-workers, supervisors and the general  
15 public, and he will likely need extra encouragement to ask questions  
16 and request assistance. Tr. 332. Finally, Dr. Mabee noted  
17 "Plaintiff's paranoia and social anxiety does not appear to have  
18 improved over the past year." Tr. 334.

19 The ALJ's first reason for rejecting this evidence was that the  
20 three opinions were not supported by objective evidence. To reject  
21 examining physician opinions in favor of contradictory non-examining  
22 opinions, an ALJ must provide "specific and legitimate" reasons.  
23 *Lester*, 81 F.3d at 830. The ALJ's first reason - that the  
24 conclusions of Dr. Mabee, Mr. Erickson and Ms. Carroll are not  
25 supported by objective evidence - fails. In each of the DSHS  
26 assessments, Plaintiff was administered a battery of objective  
27 tests, that were interpreted by the examiner and approved by Dr.  
28 Mabee. See Tr. 262-63; 265; 275-76; 335-43.

1 For example, in the 2007 examination, Plaintiff's objective  
2 test scores indicated sufficient effort, average intelligence  
3 scores, and an invalid MMPI-2 score due to an elevated F-Scale, that  
4 was "likely a result of his current psychological distress and not  
5 an intentional distortion of his symptoms." Tr. 278. Ms. Carroll  
6 noted that Plaintiff's GAF score of 47 suggests he experiences  
7 serious difficulties functioning on a daily basis. Tr. 279.

8 Similarly, in the 2008 examination, objective tests results  
9 indicated Plaintiff gave sufficient effort, and the HAM-A score  
10 indicated "a severe level of reported and observed anxiety." Tr.  
11 266. His BDI score indicated a moderate level of depression, and  
12 psychological tests indicated roughly average abilities related to  
13 memory. Tr. 267. The PAI test, which measures emotional functioning,  
14 was questionably valid, because some indications exist that  
15 Plaintiff "over-endorsed items that may create an unfavorable  
16 impression." Tr. 267. The PAI results indicated that Plaintiff is  
17 withdrawn, isolated, has few if any interpersonal relationships and  
18 experiences a "discomforting level of anxiety and tension." Tr.  
19 267. The PAI results indicate that Plaintiff likely is "plagued by  
20 worry to a degree that it would have a negative impact on his  
21 ability to concentrate and attend." Tr. 267. Additionally, Mr.  
22 Erickson reported "consistent with his clinical interview,  
23 [Plaintiff's] PAI results indicate he is experiencing overt physical  
24 symptoms of stress and anxiety such a sweaty palms, trembling hands,  
25 irregular heart beats, and shortness of breath." Tr. 268.

26 Additionally, the 2009 objective testing administered by Dr.  
27 Mabee indicated several areas of the MMPI-2RF scales that were  
28 indicative of critical limitations, including feelings of

1 helplessness/hopelessness, anxiety, and ideas of persecution. Tr.  
2 353. Dr. Mabee, relying upon the results from the varied tests,  
3 indicated Plaintiff had four marked limitations and two moderate  
4 limitations in his ability to perform normal, daily work. Tr. 332.

5 Contrary to the ALJ's conclusion, the objective medical  
6 evidence supports the assessments made by the examiners. In  
7 addition to the test results, the examiner's observations also  
8 support their diagnoses and assessments. Mental impairment "signs"  
9 are medically demonstrable phenomena that indicate specific  
10 psychological abnormalities, such as abnormalities of behavior or  
11 mood and that are "shown by observable facts that can be medically  
12 described and evaluated." 20 C.F.R. § 404.1528 (b). The results of  
13 the objective medical tests administered to Plaintiff are sufficient  
14 evidence of Plaintiff's mental impairment and the conclusions  
15 provided by the various medical examiners.

16 It is well-settled that an ALJ may not render his or her own  
17 medical opinion or substitute his or her own diagnosis for that of  
18 a claimant's physician. See *Tackett*, 180 F.3d at 1102-03 (ALJ erred  
19 in rejecting physicians' opinions and finding greater residual  
20 functional capacity based on claimant's testimony concerning a road  
21 trip; there was no medical evidence to support the ALJ's  
22 determination); *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir.  
23 1975) (an ALJ is forbidden from making his own medical assessment  
24 beyond that demonstrated by the record); *Balsamo v. Chater*, 142 F.3d  
25 75, 81 (2d Cir. 1998) (an "ALJ cannot arbitrarily substitute his own  
26 judgment for competent medical opinion") (internal quotation marks  
27 and citation omitted); *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir.  
28 1996) ("ALJs must not succumb to the temptation to play doctor and

1 make their own independent medical findings"). In this case, the  
2 ALJ's conclusion was contradicted by several mental health experts  
3 interpretations of Plaintiff's test results, and, thus, the ALJ  
4 erred by relying upon his own interpretation of Plaintiff's test  
5 results.

6 The ALJ's second reason for rejecting the three DSHS opinions  
7 was that while he acknowledged Plaintiff has social function  
8 limitations, because of the presence of "over-reporting," the ALJ  
9 concluded the RFC adequately addressed Plaintiff's social  
10 limitations.<sup>2</sup> Tr. 35-36. Ms. Carroll, with Dr. Mabee's approval,  
11 explained that Plaintiff's invalid MMPI-2 scores were likely the  
12 result of psychological distress and not an intentional distortion  
13 of his symptoms. Tr. 278. Dr. Rubin, noted below, explained that  
14 Plaintiff's over-reporting was a symptom of his mental illness -  
15 Plaintiff is convinced he has a very serious disorder. Tr. 52-53.  
16 These medical opinions about the cause and proper interpretation of

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18 <sup>2</sup>The ALJ found Plaintiff's statements concerning the intensity,  
19 persistence and limiting effects of his symptoms were not credible  
20 to the extent they were inconsistent with the RFC. Tr. 32. The ALJ  
21 made no specific findings, and provided no explanation related to  
22 this credibility determination. An ALJ may reject a claimant's  
23 testimony regarding the severity of symptoms only if the ALJ makes  
24 specific findings stating "clear and convincing" reasons for doing  
25 so. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9<sup>th</sup> Cir. 1996). The ALJ  
26 must state specifically which symptom testimony is not credible and  
27 what facts in the record lead to that conclusion. *Id.* The ALJ  
28 failed to do so here.

1 Plaintiff's over-reporting were not contradicted, and when the  
2 opinions are properly credited, the ALJ's conclusion that the RFC  
3 adequately accommodated Plaintiff's severe social limitations fails.

4 **2. Steven Rubin, Ph.D.**

5 Steven Rubin, Ph.D., a clinical psychologist, testified as a  
6 non-examining physician at Plaintiff's hearing. Tr. 48-56. After  
7 reviewing Plaintiff's records, Dr. Rubin testified that Plaintiff  
8 suffers from schizotypal personality disorder, in addition to  
9 dysthymia. Tr. 51. Dr. Rubin noted that the record was  
10 disconcerting due to the widely varying severity of impairment noted  
11 by different physicians. Tr. 52. Dr. Rubin opined that the  
12 disparities could likely be explained by reason of Plaintiff's  
13 condition worsening, as the most recent evaluation reflected the  
14 most severe limitations. Tr. 52-53. Dr. Rubin also opined that  
15 Plaintiff's condition will worsen until and unless he has treatment  
16 and counseling. Tr. 53-54.

17 Additionally, Dr. Rubin distinguished Plaintiff's "over-  
18 reporting" from malingering:

19 Mr. Tafuri has been convinced for many years that he has  
20 a serious disorder, that he's very different from other  
21 people, that he can't stand social relationships. . . .  
22 [T]hat issue of somatoform disorder, he will over-report  
23 medical problems, even if there is little medical evidence  
24 supporting it. So I don't think that there's a question  
25 here of malingering; I think there's a question of a young  
26 man who has had problems chronically, who sees social  
27 relationships as very difficult. . . . And I think he  
28 over-reports on questionnaires, hence we would see very  
high elevations in an MMPI. But I am concerned that his  
disorder has either continued or worsened.

Tr. 52-53.

The ALJ gave Dr. Rubin's opinions little weight. Tr. 34. The  
ALJ found that Dr. Rubin's assessment of Plaintiff's moderate and

1 severe limitations in social functioning were "not supported by the  
2 evidence in the [DSHS] narrative reports." Tr. 34. The ALJ stated  
3 he relied upon the facts that Plaintiff arrived on time, cooperated,  
4 timely finished testing and was able to interact well with medical  
5 providers and maintain appointments as contradictions to Dr. Rubin's  
6 conclusions. Tr. 34. The ALJ also added that while Dr. Rubin  
7 "mentioned claimant's over-reporting in his testimony, it appears he  
8 gave no consideration to that fact when assigning these  
9 limitations." Tr. 34.

10 The ALJ's analysis is problematic. First, while the ALJ used  
11 the DSHS reports to discount Dr. Rubin's assessments, in seeming  
12 contradiction, the ALJ gave "little weight" to the DSHS assessments.  
13 Tr. 34. Apparently, the ALJ relied upon the DSHS reports of  
14 Plaintiff's punctuality, ability to focus upon the tasks during the  
15 administered tests and his cooperation with interviewers. Tr. 34.  
16 Dr. Rubin acknowledged that while Plaintiff can "concentrate enough  
17 to take the psychological tests," he opined that this single factor  
18 does not reflect the full spectrum of Plaintiff's condition. Tr.  
19 56. Dr. Rubin opined that Plaintiff has at least two marked  
20 limitations - in the ability to work in coordination with or  
21 proximity to others without being distracted and in the ability to  
22 interact with the general public. Tr. 55. Dr. Rubin indicated  
23 Plaintiff may have another marked limitation in dealing with the  
24 general public. Tr. 55.

25 Additionally, the ALJ's conclusion that Dr. Rubin failed to  
26 consider Plaintiff's over-reporting is not supported by the record.  
27 In fact, Dr. Rubin specifically addressed Plaintiff's over-reporting  
28 and explained that the condition was not malingering, as inferred by



1 the ALJ, but instead was a symptom of Plaintiff's somatoform  
2 disorder. Tr. 53-54. As such, contrary to the ALJ's conclusion,  
3 the Plaintiff's over-reporting supported the diagnosis and provided  
4 additional evidence of his limitations. In sum, the ALJ erred by  
5 rejecting Dr. Rubin's testimony.

6 **3. Mary A. Gentile, Ph.D.**

7 The Plaintiff contends that the ALJ erred by stating that he  
8 gave substantial weight to the opinion of Dr. Gentile, but ignored  
9 large portions of Dr. Gentile's opinion. ECF No. 14 at 12. The ALJ  
10 gave "significant weight" to the opinion of Mary A. Gentile, Ph.D.,  
11 a non-examining physician who completed the Psychiatric Review  
12 Technique form and the Mental Residual Functional Capacity  
13 Assessment. Tr. 34; 309-26. The ALJ emphasized that he relied  
14 heavily upon Section III of the assessment for guidance in  
15 determining Plaintiff's RFC. Tr. 34.

16 On January 9, 2009, Dr. Gentile completed a Psychiatric Review  
17 Technique form ("PRT") and a Mental Residual Functional Capacity  
18 form ("MRFC"). Tr. 309-322; 323-25. In the PRT, Dr. Gentile rated  
19 Plaintiff's functional limitations as mild related to restriction of  
20 activities of daily living and difficulties maintaining  
21 concentration, persistence or pace, and moderate related to  
22 difficulties in maintaining social functioning. Tr. 319. In the  
23 MRFC, Dr. Gentile assessed Plaintiff with marked limitations related  
24 to the ability to interact appropriately with the general public.  
25 Tr. 324. Additionally, Dr. Gentile found Plaintiff had moderate  
26 limitations in three areas: (1) the ability to accept instructions  
27 and respond appropriately to criticism from supervisors; (2) the  
28 ability to get along with coworkers or peers without distracting

1 them or exhibiting behavior extremes; and (3) the ability to respond  
2 appropriately to changes in the work setting. Tr. 324.

3 In Section III of the MRFC, Dr. Gentile opined that Plaintiff  
4 is cognitively intact with average intelligence and memory skills.  
5 Dr. Gentile also noted that Plaintiff tolerated two testing  
6 evaluations well and concluded Plaintiff demonstrated an ability to  
7 sustain 2-hour intervals of work. Tr. 325. Dr. Gentile also  
8 observed that Plaintiff has anxiety and personality issues and  
9 recommended Plaintiff work in isolated environments away from the  
10 general public and have limited coworker interaction. Dr. Gentile  
11 opined that Plaintiff would function best in more routine  
12 environments. Tr. 325.

13 First, "[t]he opinion of a nonexamining physician cannot by  
14 itself constitute substantial evidence that justifies the rejection  
15 of the opinion of either an examining physician or a treating  
16 physician." *Lester*, 81 F.3d at 830. Additionally, an ALJ may not  
17 selectively rely on only those portions of the treatment record that  
18 support his ultimate conclusion. *See Robinson v. Barnhart*, 366 F.3d  
19 1078, 1083 (10th Cir. 2004) ("The ALJ is not entitled to pick and  
20 choose from a medical opinion, using only those parts that are  
21 favorable to a finding of nondisability") (citing *Switzer v.*  
22 *Heckler*, 742 F.2d 382, 385-86 (7th Cir. 1984)); *Day*, 522 F.2d at  
23 1156 (an ALJ is not permitted to reach a conclusion "simply by  
24 isolating a specific quantum of supporting evidence").

25 In this case, the ALJ explicitly relied upon Section III, a  
26 specific portion of Dr. Gentile's assessment, to the exclusion of  
27 the other sections of the assessment, to support his opinion. On  
28 review, Dr. Gentile's overall assessment of Plaintiff supports the

1 DSHS assessments that indicate Plaintiff has at least one marked and  
2 several moderate limitations in his social functioning. It is  
3 notable Dr. Gentile opined that Plaintiff could sustain a two-hour  
4 interval of work, but provided no opinion about Plaintiff's ability  
5 to sustain an eight-hour workday. The ALJ's reliance upon only a  
6 single portion of Dr. Gentile's opinion was error. Given that the  
7 ALJ assigned "significant weight" to the findings of Dr. Gentile,  
8 and the record as a whole supports Dr. Gentile's findings related to  
9 the Plaintiff's severe limitations in social functioning, the ALJ  
10 erred by failing to properly consider, or to provide sufficient  
11 reasons for rejecting, Dr. Gentile's findings in determining  
12 plaintiff's RFC.

13 **B. Remand for Award of Benefits**

14 While the usual course is to remand for further proceedings,  
15 this court may remand for an immediate award of benefits "when no  
16 useful purpose would be served by further administrative  
17 proceedings, . . . or when the record has been fully developed and  
18 there is not sufficient evidence to support the ALJ's conclusion."  
19 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9<sup>th</sup> Cir. 1989). This court  
20 "should credit evidence that was rejected during the administrative  
21 process and remand for an immediate award of benefits" when the  
22 following three conditions are met: "(1) the ALJ failed to provide  
23 legally sufficient reasons for rejecting the evidence, (2) there are  
24 no outstanding issues that must be resolved before a determination  
25 of disability can be made, and (3) it is clear from the record that  
26 the ALJ would be required to find the claimant disabled were such  
27 evidence credited." *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th  
28 Cir. 2004).

1 The Ninth Circuit has repeatedly credited evidence as true when  
2 the ALJ failed to provide "clear and convincing" reasons for  
3 discounting the testimony of the claimant and the opinion of the  
4 claimant's treating and examining physicians. See *Orn*, 495 F.3d at  
5 640; *Benecke*, 379 F.3d at 594; *Moisa v. Barnhart*, 367 F.3d 882, 887  
6 (9th Cir. 2004); *Rodriguez*, 876 F.2d at 763.

7 Because the ALJ did not provide clear and convincing reasons  
8 for rejecting the evidence of Dr. Mabee, Dr. Rubin and the entire  
9 opinion of Dr. Gentile, this court credits all of that evidence as  
10 true. As for the second factor, the record is fully developed.  
11 Finally, the credited opinions demonstrate that the claimant is  
12 unable to maintain gainful employment. Vocational expert Polly  
13 Petersen opined that if the combination of mental impairments  
14 attributed to Plaintiff by Dr. Rubin were present, all competitive  
15 work would be precluded. Tr. 76. Thus, the ALJ's decision is  
16 reversed and remanded for the immediate award of benefits.

#### 17 CONCLUSION

18 Having reviewed the record and the ALJ's findings, the court  
19 concludes the ALJ's decision is not supported by substantial  
20 evidence and is based on legal error. The decision is therefore  
21 **REVERSED** and the case is **REMANDED** for an immediate award of  
22 benefits. Accordingly,

#### 23 IT IS ORDERED:

24 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is  
25 **GRANTED** and the matter is **REMANDED** to the Commissioner for an award  
26 of immediate benefits.

27 2. Defendant's Motion for Summary Judgment, **ECF No. 16**, is  
28 **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff, and the file shall be **CLOSED**.

DATED April 17, 2013.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 21